Supreme Court U.S.
FILED
APR 10 2002
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No. 01-1318

In The

Supreme Court of the United States

BZAPS, INC.,

Petitioner,

vs.

CITY OF MANKATO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENT CITY OF MANKATO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES J. THOMSON
Counsel of Record
KENNEDY & GRAVEN, CHARTERED
470 Pillsbury Center
200 South Sixth Street
Minneapolis MN 55402
612-337-9300

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. May a municipality apply an adult use ordinance that is constitutional on its face to a business that periodically desires to operate as an adult use?

2. May a municipality regulate businesses holding liquor licenses by prohibiting adult uses on the premises of such businesses?

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JURISDICTIONAL STATEMENT

The U.S. Court of Appeals for the Eighth Circuit affirmed the judgment of the U.S. District Court in this matter on October 12, 2001.[1] The Eighth Circuit denied Petitioner's Petition for a Rehearing and a Rehearing en banc on December 5, 2001. Petitioner filed its Petition for Writ of Certiorari to this Court on March 5, 2002.

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

The First Amendment to the United States Constitution: "Congress shall make no law . . . prohibiting the free exercise thereof; or abridging the freedom of speech. . . . "

Section 10.83 of the Mankato City Code. (App. E-1)

Section 4.09 of the Mankato City Code. (App. F-1)

STATEMENT OF THE CASE

1. Factual Recitation

Section 10.83 of the Mankato City Code regulates adult uses. (App. E-1) The City Council adopted Section 10.83 as part of a comprehensive amendment to the City's zoning regulations. Before adopting Section 10.83, the City Council and the Planning Commission reviewed studies conducted by the cities of Indianapolis and St.

[1] Petitioner incorrectly noted in its Petition for Writ of Certiorari that the Court of Appeals entered its judgment on October 21, 2001.

Paul and Rochester, Minnesota, dealing with the issue of adverse secondary effects from adult uses. The purpose of Section 10.83 is to regulate the potential adverse secondary characteristics of adult uses and to insure that those adverse secondary effects do not contribute or enhance criminal activity or contribute to the blighting or downgrading of surrounding property. (App. C-1)

Section 10.83 defines adult uses to include specific uses, such as adult bookstores and adult cabarets. (App. E-1) Subd. 1 of Section 10.83 defines adult cabarets to include a business that provides dancing or other live entertainment "if such dancing or other live entertainment is distinguished or characterized by an emphasis on the presentation, display, depiction or description of 'specified sexual activities' or 'specified anatomical areas.' " (App. E-3) Subd. 1 defines the term "Adult Uses – Principal" as a use, business, or establishment "having more than 10% of its stock in trade or floor area allocated to, or more than twenty per cent (20%) of its gross receipts derived from, any adult use." (App. E-2)

Under Section 10.83, adult uses are permitted uses in the B-2 (General Commercial Business District) and the M-1 (Light Industrial District) if they meet other location criteria set forth in the ordinance. (App. E-7) Those location requirements state that adult use principals must be located at least 350 feet from a residential zoning district and 350 feet from other protected uses, such as a day-care center, a library, and a church. (App. E-7)

Petitioner operates Buster's Bar, which is located in the B-1 zoning district in the City. Petitioner has live

bands performing periodically at the bar. The bar is classified as a "drinking establishment" under the City's zoning regulations, and it is therefore a conditional use in the B-1 district. (App. B-1)

In early November 1998, Allan Torkelson, the owner of Buster's, called Paul Vogel, the City's zoning administrator. Mr. Torkelson asked Mr. Vogel if it was possible for the bar to have periodic performances of male dance reviews.[2] (App. B-1) The male dance reviews, including the performance of "Fatal Attraction", were to involve male dancers performing in various stages of nudity.[3] (App. B-1) Mr. Vogel informed Mr. Torkelson that if the performances fell within the definition of an adult use as set forth in the City Code, Buster's would not be allowed to conduct the performances because adult uses were not an allowable use in the B-1 zoning district. (App. B-2)

2. Procedural Posture

In December 1998, Petitioner commenced this action, claiming that the adult use regulations in Section 10.83 of the Mankato City Code were facially unconstitutional and unconstitutional as applied, because they prevented Petitioner from allowing live nude male dancers to perform

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[2] The record reflects that Petitioner indicated to the City that there would be "periodic" performances of the male dance reviews. (App. B-1)

[3] Petitioner has never disputed that the performance by "Fatal Attraction" involves dancing that is distinguished or characterized by an emphasis on the presentation, display, depiction or description of either specified sexual activities or specified anatomical areas.

at Petitioner's bar. (App. B-3) Petitioner also contended that the ordinance was not narrowly tailored to prohibit only those uses designed to produce adverse secondary effects. (App. B-4)

In its answer and counterclaim, the City affirmatively alleged that Section 10.83 was valid and constitutional in all respects. In its counterclaim, the City requested an injunction enjoining Petitioner from allowing the performance of "Fatal Attraction" or any other live dance performance involving the depiction of specified sexual activities or specified anatomical areas, as those terms are defined in Section 10.83. The City further requested a declaratory judgment declaring that Section 10.83 was applicable to the proposed performance of "Fatal Attraction" and that Section 10.83 was constitutional and valid in all respects.

Petitioner moved for a preliminary injunction. By an Order dated January 15, 1999, the United States District Court for the District of Minnesota (The Honorable Paul A. Magnuson) denied Petitioner's motion. (App. C-1) In doing so, the court concluded that Petitioner was not likely to prevail on the merits of its claims because, among other things, "it would be nonsensical if the City could not enforce its ordinances when people choose to disregard them for only one day." (App. C-7)

In October 1999, the City Council adopted an ordinance amending Chapter 4 of the City Code pertaining to liquor licenses. (App. B-4) That amendment added Section 4.09, making it unlawful for the holder of an on-sale liquor license to allow on the licensed premises any adult use as defined in Section 10.83, Subd. 1. (App. F-2)

After the City adopted Section 4.09, Petitioner served an Amended and Supplemental Complaint. (App. B-4) In addition to the issues raised in the original Complaint, the Amended Complaint challenged the constitutionality of Section 4.09. Petitioner also contended that the ordinance was facially unconstitutional and unconstitutional as applied. (App. B-4)

After cross-motions for summary judgment, the District Court entered an order on August 14, 2000 granting summary judgment in favor of the City. (App. B-1) The District Court ruled that the City's adult use ordinance was a content-neutral regulation and that it satisfied all of the elements established by the Supreme Court in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925 (1986). (App. B-6) The court also concluded that the ordinance was not unconstitutional as applied to Petitioner's proposal to operate as an adult business for one day. (App. B-9) Finally, the court ruled that Section 4.09 was a valid exercise of the City's police power and therefore complied with the standards set forth by the Supreme Court in *44 Liquormart v. Rhode Island*, 517 U.S. 484, 116 S. Ct. 1495 (1996). (App. B-15)

The United States Court of Appeals for the Eighth Circuit affirmed the judgment of the District Court on October 12, 2001. (App. A-1) The Eighth Circuit denied Petitioner's Petition for Rehearing and for Rehearing en banc on December 5, 2001. (App. D-1) Petitioner filed its Petition for Writ of Certiorari to this Court on March 5, 2002.

REASONS FOR DENYING THE WRIT

1. The Eighth Circuit's Decision Upholding the City's Adult Use Ordinance as a Valid Time, Place and Manner Restriction Is Consistent with this Court's Ruling in *City of Renton v. Playtime Theatres, Inc.*

The threshold inquiry in a First Amendment case involving a challenge to a zoning ordinance is whether the legislation is a content-based restriction or a content-neutral time, place, and manner restriction. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925 (1986); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S. Ct. 2440 (1976); *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir. 1994). Regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment, while content-neutral time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communications. In *Renton*, this Court defined "content-neutral" regulations as ones that "are *justified* without reference to the content of the regulated speech." *Renton*, 475 U.S. at 48 (emphasis in original). Because the stated purpose of the ordinance at issue in *Renton* was to address the secondary effects of adult businesses, this Court concluded that the zoning ordinance was not content-based but rather content-neutral. *Id.*

The second prong of the *Renton* test is to determine whether the ordinance serves a substantial governmental interest. To satisfy this prong, a municipality must show that the ordinance is aimed at the negative secondary

effects of adult uses rather than the content of the speech. A city may rely on the secondary effects studies of other cities as evidence of secondary effects when drafting its ordinances. This Court held in *Renton* that a municipality is *not* required to "conduct new studies or produce evidence independent of that generated by other cities or towns, so long as whatever evidence the municipality relied upon is *reasonably believed* to be relevant to the problem sought to be addressed." *Id.* at 51-52 (emphasis added).

The "reasonably believed" factor in the second prong of the *Renton* test does not require a City to prove negative secondary effects. In *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S. Ct. 1382 (2000), this Court recently affirmed the evidentiary standard in *Renton* and once again held that cities do not need to prove adverse secondary effects, but rather may rely on the experience of other cities.[4] In *Erie*, this Court upheld an ordinance banning nudity in public places where the city relied on the secondary effects studies of other cities. Citing the "reasonably believed" test from *Renton*, this Court held that

> [b]ecause the nude dancing at Kandyland is of the *same character* as the adult entertainment at issue in *Renton, Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) . . . and *California v. LaRue*, 409 U.S. 109, 93 S. Ct. 390 (1972), it was

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[4] Although the Court analyzed the ordinance in *Erie* under the four-part test in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673 (1968), the Court noted that "the evidentiary standard described in *Renton* controls here, and Erie meets that standard." *Erie*, 529 U.S. at 297.

> reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects. And Erie could reasonably rely on the evidentiary foundation set forth in *Renton* . . . to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood.

Erie, 529 U.S. at 296-97, 120 S. Ct. 1382 (emphasis added) (citing *Renton*, 475 U.S. at 51-52, 106 S. Ct. 925). *Erie* confirms that studies upon which cities rely do not have to be directly on point in order to pass the narrow tailoring test. If the adult use is of the same character and a city "reasonably believes" that the activity may cause some of the negative secondary effects set forth in the studies, an ordinance will pass constitutional muster. *See also Young*, 427 U.S. 50 at 71 (an ordinance need not adopt the least restrictive alternative by focusing on the precise adverse effects cited in the studies; a city "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.")

The third prong of the *Renton* test is to determine whether the ordinance provides a reasonable alternative avenue of communication. This prong is satisfied by providing adult uses with a reasonable opportunity to locate within the city. *Renton*, 475 U.S. at 53.

In this case, Petitioner does not dispute that the City's adult use ordinance meets the first and third prongs of the *Renton* test. Section 10.83 does not ban any particular message, but merely regulates the location of adult uses as defined by the ordinance. In addition, there

is no dispute about available locations in the City for adult uses.

Petitioner argues, however, that the City's ordinance does not further a substantial governmental interest and, therefore, fails to meet the second prong of the *Renton* test. In particular, Petitioner argues that the ordinance is not narrowly tailored because the City cannot prove any adverse secondary effects as a result of periodic performances of live nude dancing. However, the contention that the City must prove that adverse secondary effects will occur as a result of an adult use is directly contrary to this Court's ruling in *Renton*. Nothing in *Renton* requires the City to make such a showing.

Taken to its logical conclusion, Petitioner's argument would mean that Petitioner could conduct live stage shows 29 days out of every month, and the City would not be able to enforce its adult use ordinance unless the City could demonstrate that such a business actually caused adverse secondary effects. This is simply not the law. The City may enforce its ordinances even when people choose to disregard them for only one day. This case is no different than a situation where the owner of a vacant lot in a single-family residential district desires to turn the lot into a used car sales lot for one day. For that day, the use of the property is a used car lot, and a city's zoning regulations could prohibit such a use. In this instance, Petitioner's business would constitute a prohibited adult use as defined in the City's ordinance if Petitioner conducted live, nude stage shows one day out of the year or 365 days out of the year.

The record in this case unequivocally establishes that the City complied with the second prong of the *Renton* test when Section 10.83 was adopted. Before adopting that provision, the City Council and the Planning Commission reviewed studies conducted by other cities dealing with the issue of adverse secondary effects of adult uses. The stated purpose of Section 10.83 is to regulate the potential adverse secondary characteristics of adult uses and to insure that those adverse effects do not contribute or enhance criminal activity or contribute to the blighting or downgrading of surrounding property. In fact, the ordinance adopted by the City is almost identical to the ordinance upheld in *Renton*. Thus, the Eighth Circuit properly concluded that the ordinance is constitutional both on its face and as applied to Petitioner.

2. The Eighth Circuit's Decision Does Not Conflict with the Decisions of Other Circuits.

Petitioner contends that this Court should accept review of this case because a conflict exists between the federal circuit courts as to the standard to be followed by municipalities in adopting adult-use regulations under this Court's holding in *City of Renton*. In particular, Petitioner asserts that the Eighth Circuit opinion conflicts with opinions from the Ninth Circuit, the Eleventh Circuit and the Seventh Circuit. *See Tollis, Inc. v. San Bernadino County*, 827 F.2d 1329 (9th Cir. 1987); *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000), *cert. granted*, 532 U.S. 902, 121 S. Ct. 1223 (2001); *Flanigan's Enterprises v. Fulton County*, 242 F.3d 976 (11th Cir. 2001); *Schultz v. City of Cumberland*, 228 F.3d 831 (7th

Cir. 2000). Contrary to Petitioner's claim, however, the Eighth Circuit's opinion in the present case is consistent with this Court's ruling in *Renton*. The decisions upon which Petitioner relies are either factually distinguishable from the present case or have misapplied the long-standing rule in *Renton*. Thus, the petition for writ of certiorari should be denied.

The primary decisions upon which Petitioner relies are the Ninth Circuit decisions in *Tollis* and *Alameda Books*. Those cases are factually dissimilar from the present case. In *Tollis*, the county enacted an ordinance regulating the distance between adult-oriented businesses and residential property, churches, funeral homes, schools, parks and playgrounds. The ordinance defined an "adult theater" as "structures 'temporarily *or* permanently used for' the presentation of films . . . or live entertainment emphasizing certain specified sexual activities or anatomical areas." *Tollis*, 827 F.2d at 1331 (emphasis added). The County interpreted the ordinance in such a way that a single showing of an adult movie would convert a theater into an adult-oriented business for purposes of the ordinance. The ordinance was challenged as being "unconstitutionally vague on its face because it failed to define the extent of use for showing adult films that would be necessary to render a theater an 'adult business.' " *Id.* at 1333.

Unlike Petitioner's business in the present case, *Tollis* involved a movie theater that was already protected by the First Amendment. Here, Petitioner's business is classified under the City's zoning regulations as a "drinking establishment." A "drinking establishment" is not protected by the First Amendment.

Also, whether the City's ordinance is vague is not an issue before this Court. Section 10.83 of the City's Code clearly defines each adult use and prescribes the allowed locations. Unlike the ordinance in *Tollis*, the definition for "adult-use cabaret" in the City's ordinance does not distinguish between temporary or permanent uses. Petitioner's use of its establishment as an adult-use cabaret is prohibited in the district in which Petitioner is located, regardless of the number of days out of the year it would be operating as such. Further, the City's ordinance imposes penalties for ordinance violations on a daily basis.

Not only is *Tollis* factually distinct from the present case, but the *Tollis* court clearly misapplied the standard under *Renton*. The City does not need to show that Petitioner's use of its establishment as an adult-use cabaret use will indeed produce undesirable secondary effects. The City's reliance on the studies of other communities that found negative secondary effects were caused by businesses of a similar nature is sufficient under *Renton*.

Alameda Books is also distinguishable from the present case. In *Alameda Books*, the City of Los Angeles attempted to regulate a combination adult bookstore/arcade under an ordinance that would permit either an adult bookstore or an adult arcade, but not both, at one location. The Ninth Circuit struck down the ordinance because the city relied on *no* study concluding that a combination bookstore/arcade would produce negative secondary effects. In contrast, the City in this case relied on several relevant secondary effects studies when adopting its adult use zoning regulations.

The final two cases upon which Petitioner relies are also irrelevant to this case. In *Flanigan's Enterprises v. Fulton County*, 242 F.3d 976 (11th Cir. 2001), the court considered a county regulation banning nude dancing in establishments that serve liquor. The ordinance did not involve a zoning restriction. Thus, the adverse secondary effects from proximity to churches, schools, and other specific land uses were not at issue. The court did, however, look at the county's basis for the regulations in targeting the undesirable secondary effects of adult entertainment establishments that serve alcohol. The court found the ordinance unconstitutional because the County conducted its own studies on specific areas. Those studies indicated no adverse secondary effects, but the County rejected those conclusions in favor of studies from different cities and different time periods.

Finally, Petitioner's reliance on the Seventh Circuit decision in *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir., 2000) is also misplaced for a variety of reasons. First, the case involved provisions in the city's ordinance regulating nudity, not a zoning regulation. The court held that the provision in the ordinance banning full nudity within sexually oriented businesses was constitutional, but the provision of the ordinance banning certain sexually explicit movements was unconstitutional because it prevented a "protected form of expression." *Schultz*, 228 F.3d at 847-48. The other issues in *Schultz* were whether a section of the ordinance was overbroad and whether certain licensing provisions were unconstitutional prior restraints on expression.

This Court has already settled the question of the proper standard for cities to follow when adopting zoning ordinances that regulate the location of adult businesses. The rule established in *Renton* needs no further clarification by this Court, and the Eighth Circuit's decision in this case is consistent with *Renton*.

3. The Eighth Circuit's Decision Does Not Conflict with this Court's Decision in *44 Liquormart, Inc. v. Rhode Island*.

Petitioner argues that this Court should grant certiorari in order to address unanswered questions left by *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S. Ct. 1495 (1996) concerning the government's ability to regulate sexually explicit entertainment in the absence of secondary effects. However, Petitioner incorrectly interprets the holding and applicability of *44 Liquormart*. Contrary to Petitioner's assertion, this Court did not overrule *California v. LaRue* in *44 Liquormart*. Accordingly, the City's ordinance regulating adult uses at liquor establishments is valid and constitutional in all respects.

In *California v. LaRue*, 409 U.S. 109, 114, 93 S. Ct. 390, 395 (1972) this Court upheld, as a valid exercise of the general police power, an ordinance prohibiting nude dancing where liquor was sold. In doing so, this Court relied in part on the Twenty-first Amendment and found that a municipality's conclusion "that certain sexual performances and the dispensing of liquor by the drink ought not to occur at premises that have licenses was not an irrational one." *Id.* at 118, 93 S. Ct. at 397. Since *LaRue*, this Court and other federal courts, have consistently

upheld ordinances banning nude dancing at liquor establishments. *See Newport v. Iacobucci*, 479 U.S. 92, 107 S. Ct. 383 (1986); *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S. Ct. 2599 (1981); *Farkas v. Miller*, 151 F.3d 900 (8th Cir. 1998); *International Eateries of America v. Broward County*, 941 F.2d 1157, 1162 (11th Cir. 1991); *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993 (11th Cir. 1998); *J & B Entertainment v. City of Jackson*, 152 F.3d 362 (5th Cir. 1998); *D & G Restaurant v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991).

This Court recently reaffirmed the precedential value of *LaRue* in *44 Liquormart*. In *44 Liquormart*, this Court invalidated a state statute prohibiting advertisement of liquor prices and rejected the contention that the Twenty-first Amendment overrode the First Amendment. However, this Court explicitly stated that it did not question the holding in *LaRue* and, in fact, noted that "the Court's analysis in *LaRue* would have led to precisely the same result even if it had placed no reliance on the Twenty-first Amendment." *44 Liquormart*, 517 U.S. at 515. All nine justices agreed with the portion of the opinion concluding that the *LaRue* holding is still valid. In fact, Justice O'Connor's concurring opinion, which was joined by three other justices, points out that the *LaRue* decision has been consistently followed by other Supreme Court decisions. *Id.* at 533, 116 S. Ct. at 1523. Justice O'Connor concluded that the Court of Appeals' reliance on *LaRue* was misplaced only because the Twenty-first Amendment was not relevant to a case involving commercial speech.

Petitioner argues, essentially, that *44 Liquormart* requires that a city's ordinance regulating the sale of

liquor at adult establishments is only valid if it is "narrowly tailored" to uses shown to cause adverse secondary effects. In other words, regulation of nude entertainment in liquor establishments must now be judged by the same constitutional tests as nude dance entertainment in non-liquor establishments. This argument is without merit. Unlike the ordinance at issue in *44 Liquormart*, the City's ordinance in the present case does not prohibit activity protected by the First Amendment. Rather, the City's ordinance merely regulates such activity by stating that it cannot be conducted at premises holding liquor licenses. Contrary to Petitioner's argument, *44 Liquormart* confirms that ordinances regulating adult uses in liquor establishments are a valid exercise of the police power and do not need to be analyzed under the factors set forth in *City of Renton* or *Barnes*. *44 Liquormart*, 517 U.S. at 515, 116 S. Ct. at 1514. (States "inherent police powers" provide ample authority to prohibit the sale of alcoholic beverages in appropriate locations.)

To support its argument that liquor regulations must be justified under a "secondary effects" theory, Petitioner relies on *Lounge Management Ltd. v. Town of Trenton*, 580 N.W.2d 156 (Wis. 1998); *Flanigan's Enterprises v. Fulton County*, 242 F.3d 976 (11th Cir. 2001); and *LSO, Ltd. v. Stroh*, 205 F.3d 1146 (9th Cir. 2000). All of these decisions are distinguishable from the present case and none of them support Petitioner's position.

First, in *Lounge Management*, the ordinance involved was a general public nudity ordinance. The Wisconsin Supreme Court invalidated the ordinance, not because

the city exceeded the scope of its police powers in enacting the ordinance, but because the ordinance was overbroad. *Lounge Management*, 580 N.W.2d at 164. It did so because the ordinance, unlike the ordinance in this case, did not regulate just nude dancing – it prohibited all public nudity. *Id.* at 161. The substantial overbreadth principle relied upon by the court in *Lounge Management* is not an issue here.

Also contrary to Petitioner's assertion, the *Stroh* decision does not support Petitioner's position with respect to the City's liquor regulation. *Stroh* is distinguishable from this case for at least three significant reasons. First, the First Amendment principle that was at stake in *Stroh* was an art exhibit, not live nude dancing. Art exhibits are traditionally recognized as one of the most fundamental principles protected by the First Amendment, as compared to live nude dancing, which is only "marginally" protected by the First Amendment. *Barnes v. Glen Theatre, Inc.*, 510 U.S. 560, 566, 111 S. Ct. 2456, 2460 (1991). The second factual distinction between *Stroh* and this case is that in *Stroh* the applicant was not proposing to sell liquor in the area where the art exhibit and trade show were to take place.

Stroh is also legally distinguishable from this case because in *Stroh* the defendants' decision to prohibit the art exhibit was clearly based on their authority to regulate alcohol, not, as in this case, on a municipality's general police powers. The Ninth Circuit stated that the Supreme Court "made clear in *44 Liquormart* that the Twenty-first Amendment does not authorize states to enact liquor regulations that would otherwise be prevented by the First Amendment in other contexts." *Stroh*,

205 F.3d at 1159. In the present case, the findings that were adopted by the City Council when Section 4.09 was enacted clearly indicate that the City was acting pursuant to its general police powers. Nothing in *Stroh* stands for the proposition that a municipality, by virtue of its general police power authority, is precluded from regulating adult uses in liquor establishments. As indicated above, virtually every court that has addressed this issue, both before and after *44 Liquormart,* has upheld a municipality's authority to regulate adult uses in liquor establishments.

Finally, Petitioner's reliance on *Flanigan's* is also misplaced. The ordinance in *Flanigan's* involved a total ban on nude dancing in establishments that serve liquor. *Flanigan's Enterprises,* 242 F.3d at 974. Thus, the court analyzed the county ordinance as a content-neutral regulation under this Court's test set forth in *O'Brien,* rather than as an exercise of the police power as contemplated by *LaRue* and *44 Liquormart.* In addition, the Eleventh Circuit agreed with the district court that the power to prohibit the sale of alcoholic beverages in inappropriate locations is the "inherent police power of every state." *Id.* at 974, n. 9.

In this case, the City adopted the ordinance prohibiting liquor at adult establishments pursuant to its police powers. The Council's findings expressly state that the ordinance is not meant to regulate the content of activities protected by the First Amendment. Thus, the Eighth Circuit correctly found that Section 4.09 is a valid exercise of the City's police powers under *LaRue* and *44 Liquormart.*

Petitioner incorrectly interprets and applies this Court's holding in *44 Liquormart*. This Court does not need to grant review to clarify any unanswered questions with respect to the impact of *44 Liquormart*.

CONCLUSION

Petitioner has not demonstrated any compelling reasons for this Court to exercise its discretion in favor of granting the petition. The Eighth Circuit decision is consistent with previous rulings from this Court and does not conflict with decisions from other circuits. The City respectfully requests that the Court deny the petition.

Dated April 10, 2002.

Respectfully Submitted,

JAMES J. THOMSON
Counsel of Record
KENNEDY & GRAVEN, CHARTERED
470 Pillsbury Center
200 South Sixth Street
Minneapolis MN 55402
612-337-9300